IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATE OF WEST VIRGINIA, EX REL. PATRICK MORRISEY

Plaintiff,

v. **Civil Action No. 14-1287-RBW**

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

Defendant.

PLAINTIFF STATE OF WEST VIRGINIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Patrick Morrisey (DC Bar 459399)
Attorney General of West Virginia

s/ Elbert Lin
Elbert Lin (DC Bar 979723)
Solicitor General
Misha Tseytlin (DC Bar 991031)
Deputy Attorney General
Julie Marie Blake (DC Bar 998723)
Assistant Attorney General

Office of the Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: elbert.lin@wvago.gov

Counsel for Plaintiff the State of West Virginia

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INTRODUCTION

This case involves core questions about the rule of law and the proper role of the President and the States in our system of government. The Constitution and laws of the United States prohibit the President from picking and choosing the laws that he enforces. Yet that is precisely what the President and his agencies have done with many federal laws, including the Patient Protection and Affordable Care Act ("ACA"). The State of West Virginia has brought this suit against just one of the many examples because it uniquely harms the States by unlawfully shifting to them the exclusive enforcement responsibility for a politically unpopular part of the ACA.

The ACA made illegal any health insurance plans that fail to comply with certain new federal market requirements, resulting in the cancellation of millions of individual health plans and a political quandary for the President. Before the ACA went into effect, critics warned that these new federal requirements would cause many health insurance plans to be canceled. In response, President Barack Obama famously and repeatedly promised that, under the ACA, "if you like your health care plan, you can keep your health care plan." But as the effective date for the new federal requirements approached and penalties for the sale of illegal plans loomed, insurance companies began canceling millions of Americans' individual health insurance plans for failure to comply with the ACA's requirements, just as critics had predicted.

The President responded to this public relations disaster by directing the Department of Health and Human Services ("HHS") to unilaterally and unlawfully cease federal enforcement of the ACA's market requirements. Following the President's directive, HHS adopted the "Administrative Fix," a binding rule that now prohibits HHS from enforcing the new federal requirements on individual health insurance plans until October 2016. Commentators from

across the political spectrum criticized the Fix as illegal, explaining that the ACA makes federal enforcement of the federal market requirements mandatory. Despite this condemnation, the President specifically rejected working with Congress to lawfully fix the problem of canceled plans, and even threatened to veto legislation that would have permanently remedied the problem.

The Administrative Fix is unlawful in at least four ways. *First*, it contravenes the ACA's plain text, which mandates that HHS "shall enforce" the new federal market requirements if the States have not done so. *Second*, it is a substantive rule that was issued without the notice-and-comment procedure required by the Administrative Procedure Act. *Third*, it unlawfully delegates federal executive authority to the States. *Fourth*, in violation of the Tenth Amendment and the anti-commandeering doctrine, the Fix shifts from the Federal Government to the States the political accountability for deciding whether to enforce the federal market requirements.

Americans who like their health insurance plans should be able to keep those plans, of course, just as the President promised them. But the President's administrative solution to his flawed law is illegal and comes at the expense of the States by making them solely responsible and accountable for the unpopular and technically problematic parts of the law. As the Supreme Court has recently reiterated, "[u]nder our system of government, Congress makes laws and the President, acting at times through agencies like [HHS], 'faithfully execute[s]' them." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446, 189 L. Ed. 2d 372 (2014) (quoting U.S. Const. art. II, § 3). The Executive "does not [have the] power to revise clear statutory terms that turn out not to work in practice." *Id.* Accordingly, West Virginia asks this Court to hold that the Fix is unlawful and require the Administration to work with Congress to come up with a legal,

legislative solution to the fact that the ACA renders unlawful millions of individual health insurance plans.

BACKGROUND

I. THE ACA MANDATES ENFORCEMENT OF EIGHT NEW FEDERAL MARKET REQUIREMENTS

The ACA dramatically changes the market for individual health insurance in many ways, including the imposition of eight new federal market requirements on health insurers. Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of the code). Under the ACA, health insurers providing individual health plans must comply with the following:

- policy premiums can vary only based on age, tobacco use, family size, and geography;
- insurers must accept every individual and group that applies for new coverage, regardless of medical history or health status;
- insurers must accept every individual and group that applies to renew coverage;
- insurers may not discriminate against consumers based on pre-existing conditions;
- insurers may not discriminate against consumers based on health status, claims experience, receipt of health care, medical history, genetic information, evidence of insurability (including conditions arising out of acts of domestic violence), or disability;
- insurers cannot discriminate against any health care provider;
- insurers cannot decline to pay for or discriminate against clinical trial expenses; and
- plans must cover "essential" minimum benefits with only limited cost-sharing, including ambulances, ER visits, hospitals, maternity care, mental health, prescription drugs, rehab services, lab services, child services, and oral and vision care.

42 U.S.C. § 300gg–300gg-6, 300gg-8.

All individual health insurance plans begun or renewed after January 1, 2014, must comply with these requirements unless they qualify for the grandfathering exception, which exempts only those plans in existence on March 23, 2010 that have not been significantly modified thereafter. 42 U.S.C. § 300gg–300gg-6, 300gg-8; *id.* § 18011; *id.* § 18011(1); 45 C.F.R. § 147.140(g)(1)(ii). Over time, fewer and fewer grandfathered plans will remain. HHS has estimated that "the percentage of individual market policies losing grandfather status in a given year [will exceed] the 40 percent to 67 percent range." 75 Fed. Reg. 34,538, 34,553 (June 17, 2010).

The ACA specifies that the eight federal market requirements are to be enforced through a two-tiered regime. *First*, the States have the initial option to voluntarily enforce the federal requirements by prohibiting the issuance of non-compliant individual health plans. 42 U.S.C. § 300gg-22(a)(1). *Second*, if the States choose not to do so voluntarily, HHS *must* enforce the requirements. 42 U.S.C. § 300gg-22; *see also* 78 Fed. Reg. 13,406, 13,419 (Feb. 27, 2013). Under the ACA, if HHS makes a "determination" of nonenforcement by a State, "the Secretary [of HHS] *shall enforce* [the provisions of this part] insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage." 42 U.S.C. § 300gg-22(a)(2) (emphasis added); *see also* 45 C.F.R. § 150.203. Federal enforcement brings stiff fines for non-complying insurers of up to $100 per day per plan member. 42 U.S.C. § 300gg-22(b)(2)(C); 45 C.F.R. § 150.315. If an insurer fails to pay a penalty after it has exhausted its review options, HHS "shall refer" the matter to the Attorney General for legal action. 42 U.S.C. § 300gg-22(b)(2)(F)(i).[1]

[1] The ACA earmarks funds collected from federal enforcement actions to finance future HHS enforcement. 42 U.S.C. § 300gg-22(b)(2)(G).

This two-tiered regime resembles the "cooperative federalism" regimes that Congress has used in other federal laws, wherein Congress pre-empts state regulation but gives the States the opportunity to regulate (or continue regulating) under certain conditions. For example, in *FERC v. Mississippi*, 456 U.S. 742, 102 S. Ct. 2126 (1982), a federal law "allowed the States to continue regulating in [an] area on the condition that they consider [certain] suggested federal standards." *Id.* at 765, 102 S. Ct. at 2140 (emphasis omitted). Otherwise, the federal law required the States to "simply stop[] regulating in the field." *Id.* at 764, 102 S. Ct. at 2140. More similar to this case, in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 101 S. Ct. 2352 (1981), a federal law "allow[ed] the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs." *Id.* at 289, 101 S. Ct. at 2366–67. If the States declined to enforce, the Federal Government would enact its own regulatory regime. *Id.* at 272, 101 S. Ct. at 2358. Under the ACA, the Federal Government has given the States the opportunity to enforce the new federal market requirements in the first instance, but will do so itself if the States decline to do so.

Before the federal market requirements were scheduled by law to take effect on January 1, 2014, many States made public whether they intended to play an enforcement role. Some States, including West Virginia, intended to enforce part or all of the eight federal requirements. *See, e.g.*, Nat'l Ass'n of Ins. Comm'rs, Survey on State Auth. to Enforce PPACA Immediate Implementation Provisions (Aug. 5, 2010) (Exh. A). Others stated that they would not enforce the federal requirements, triggering HHS's mandatory enforcement burden. *Id.*

II. THE ACA'S FEDERAL MARKET REQUIREMENTS CAUSE THE CANCELLATION OF MILLIONS OF INDIVIDUAL HEALTH INSURANCE PLANS

In late 2013, it became clear that millions of individual health plans had been or would be required to be canceled as a result of the ACA's new federal market requirements. *E.g.*, Avik Roy, *The Obamacare Exchange Scorecard: Around 100,000 Enrollees And Five Million Cancellations*, Forbes.com (Nov. 11, 2013) (Exh. B). At the time, many individual health insurance plans were not grandfathered and did not comply with at least some of the new federal requirements. In anticipation of the January 1, 2014 effective date for the new federal requirements, insurers sent millions of notices informing customers that such plans would soon be canceled.

These cancellation notices caused widespread public outcry. President Obama was roundly criticized for violating his oft-repeated pledge that, under the ACA, "if you like your health care plan, you can keep your health care plan." *See, e.g.*, Barack Obama, U.S. President, Remarks by the President in Health Insurance Reform Town Hall (Aug. 11, 2009) (Exh. C). Non-partisan fact checkers famously dubbed the President's promise the "lie of the year." Angie Drobnic Holan, *Lie of the Year: 'If you like your health care plan, you can keep it,'* PolitiFact.com (Dec. 12, 2013) (Exh. D). Even the President's own party has "cried foul." *Id.* Former House Financial Services Committee Chairman Barney Frank recently said that the President "should never have said . . . that if you like your current health care plan, you can keep it. That wasn't true." Zach Carter, *Barney Frank 'Appalled' By Obama Administration: 'They Just Lied To People,'* Huffington Post (Aug. 1, 2014) (Exh. E); *see also* Clarence Page, *The truth? Obama told a whopper*, Chicago Tribune (Nov. 6, 2013) (Exh. F) ("[Obama] would have to be delusional to think he was telling the truth.").

III. HHS ISSUES A BINDING RULE PROHIBITING FEDERAL ENFORCEMENT OF THE ACA'S MARKET REQUIREMENTS AGAINST NON-COMPLIANT INDIVIDUAL HEALTH PLANS AND LEAVES ENFORCEMENT, IF ANY, SOLELY TO THE STATES

On November 14, 2013, President Obama held a press conference to announce a unilateral executive action intended to absolve his Administration in general, and the ACA in particular, of political responsibility for the canceled plans. Recognizing "how upsetting this can be for a lot of Americans, particularly after assurances they heard from me that if they had a plan that they liked, they could keep it," the President explained that he and his Administration would take steps to "fix" the problem of canceled health insurance plans. Barack Obama, President, Statement by the President on the Affordable Care Act at *2 (Nov. 14, 2013) (Exh. G) (hereinafter "Presidential Press Conference"). *Id.* His solution was to direct HHS to allow "insurers [to] extend current plans that would otherwise be canceled into 2014, and [allow] Americans whose plans have been cancelled [to] choose to re-enroll in the same kind of plan." *Id.* ; *see also* Press Release, White House, Fact Sheet: New Administration Proposal to Help Consumers Facing Cancellations at *1 (Nov. 14, 2013) (Exh. H) (hereinafter "Administrative Fix Fact Sheet") (citing HHS's "administrative authority"). In other words, HHS was not to enforce the new federal market requirements against issuers of non-compliant individual health insurance plans. The President admitted that "state insurance commissioners still have the power to decide what plans can and can't be sold in their states," but also acknowledged that he sought to shift blame away from the federal government and the ACA. Presidential Press Conference, Exh. G at *2. "[W]hat we want to do is to be able to say to folks" whose individual health insurance plans were cancelled, the President explained, is that "*the Affordable Care Act* is not going to be the reason why insurers have to cancel your plan." *Id.* at *4 (emphasis added).

What the President essentially said is that these "folks" should now blame their state governments for any cancelled plans. Before the President's "fix," the States had no ability to affect the ultimate enforcement of the eight new federal market requirements. While a State could voluntarily choose to enforce the federal requirements, its decision whether to do so had no impact on whether the federal requirements would be enforced at all. As described above, if a State chose not to enforce the federal requirements, HHS was required by statute to do so. After the President's "fix," the States were the *only* entities left with the power to enforce the federal requirements, and each State's enforcement decision became *dispositive* of whether those requirements would be enforced. The blame for any cancellations of plans for failure to meet the new federal market requirements—or alternatively, for permitting the sale of unlawful plans—would now fall exclusively to the States.

The day of the President's speech, HHS formalized the President's directive as a binding rule, notwithstanding the contrary statutory text and without allowing for notice-and-comment rulemaking. In a letter addressed *to the States*, the Director of the Center for Consumer Information and Insurance Oversight within HHS explained that the so-called "Administrative Fix" would prohibit HHS from enforcing the new federal market requirements through October 1, 2014, and potentially "beyond [that] specified time frame." Letter from Gary Cohen, Director, Center for Consumer Information and Insurance Oversight (CCIIO), to Insurance Commissioners, at 1 (Nov. 14, 2013) (Exh. I) (hereinafter "Administrative Fix Letter"). For purposes of federal enforcement, HHS committed to allow health issuers to "choose to continue coverage that would otherwise be terminated or cancelled" provided that: (1) the plan was in effect on October 1, 2013; and (2) the insurer notified affected customers about the Act's health insurance exchanges and the federal market requirements with which their plan does not comply.

Id. at 1–2. If an insurer satisfied these two preconditions, the letter explained, an otherwise non-compliant individual health plan "will not be considered [by HHS as] out of compliance with the [eight federal] market reforms." *Id.* at 1. The letter also "encouraged" those "State agencies responsible for enforcing the specified market reforms" to "adopt the same transitional policy." *Id.* at 3.

At the same time, the President specifically rejected the prospect of working with Congress to reach a permanent and lawful change to the law. To stop the ACA's cancellation of health insurance plans, Congress had separately begun preparing to amend the ACA. *See, e.g.*, Keep Your Health Plan Act of 2013, H.R. 3350, 113th Cong. (2013); Keeping the Affordable Care Act Promise Act, S. 1642, 113th Cong. (2013). But the day that the President committed to his unilateral Administrative Fix, he also formally threatened to veto a legislative proposal to allow people to keep their individual health insurance plans as long as they desired. *See* Office of Mgmt. & Budget, Executive Office of the President, Statement of Administration Policy, H.R. 3350 – Keep Your Health Plan Act of 2013 (Nov. 14, 2013) (Exh. J).

IV. WEST VIRGINIA RESPONDS TO THE RULE AND ITS SUBSEQUENT EXTENSION

On November 21, 2013, the West Virginia Insurance Commissioner, Michael D. Riley, stated in response to the Administrative Fix that he would continue to enforce the ACA's new market requirements. *See* Press Release, West Virginia Office of the Insurance Commissioner, West Virginia Makes Announcement on CCIIO Re-enrollment Proposal (Nov. 21, 2013) (Exh. K). He explained that the "abrupt" Administrative Fix "comes at a time when West Virginia employers, citizens and insurance carriers have already made extensive changes to comply with the new law." *Id.* "In order to avoid further confusion, provide market stability, mitigate potential rate impacts[,] . . . and regulate the West Virginia insurance market *in accordance with*

the existing law," the Commissioner "decided to maintain [the State's] current direction." *Id.* (emphasis added).

On December 26, 2013, the State of West Virginia and nine other States wrote a letter to HHS, explaining that the Administrative Fix is "flatly illegal under federal constitutional and statutory law." Letter from Patrick Morrisey, West Virginia Attorney General *et al.*, to Kathleen Sebelius, Secretary, HHS at 1 (Dec. 26, 2013) (Exh. L). The letter explained the signatory States' "support [for] allowing citizens to keep their health insurance coverage." *Id.* But, the letter continued, "the only way to fix this problem-ridden law is to enact changes lawfully: through congressional action." *Id.*

Notwithstanding this letter, HHS has continued to rely exclusively upon the Administrative Fix, repeatedly treating the Fix as a binding rule. Since adopting the Fix, HHS has taken steps to implement the Fix, including issuing a specific disclosure statement that "*will be* considered to satisfy the [Fix's] requirement to notify policyholders of the discontinuation of their policies." Gary Cohen, Director, CCIIO, Insurance Standards Bulletin Series – INFORMATION (Nov. 21, 2013) at 2 (Exh. M) (hereinafter "Insurer Disclosure Rule") (emphasis added). The agency has refused to enforce the ACA's new federal market requirements on any insurance company that has complied with the two preconditions and renewed one of the millions of non-compliant individual health insurance plans. Furthermore, HHS has adopted two separate rules designed to mitigate the financial impact of the Fix on insurers—rules that would not have been necessary or coherent if HHS did not consider the Fix a binding rule. *See, e.g.*, HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744 (Mar. 11, 2014) (to be codified at 45 C.F.R. pt. 144, et al.); Exchange and Insurance

Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240 (May 27, 2014) (to be codified at 45 C.F.R. pt. 144, et al.).

Most recently, HHS committed to follow the Administrative Fix for two more years, prompting the West Virginia Insurance Commissioner to change his position on enforcement. In March 2014, HHS extended the Administrative Fix through October 1, 2016, promising to withhold federal enforcement of the new federal market requirements until one month before the next Presidential election. *See* Gary Cohen, Director, CCIIO, Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016 (Mar. 5, 2014) (Exh. N) (hereinafter "Extension Rule"). Faced with a much longer period of non-enforcement by the federal government, West Virginia Insurance Commissioner Riley changed course in April 2014 and announced that his office would also not enforce the ACA's federal market requirements. *See* Lydia Nuzum, *Non-Compliant Insurance Plans Get 3-Year Stay*, Charleston Gazette, 2014 WLNR 10711115 (Apr. 20, 2014) (Exh. O).

STANDARD FOR GRANTING SUMMARY JUDGMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" based upon the documents, affidavits, and other factual materials in the record. Fed. R. Civ. P. 56(a), (c). Thus, a court should grant summary judgment where a case presents "a pure question of law" after the court "determine[s] the relevant set of facts" and "draw[s] all inferences in favor of the nonmoving party to the extent supportable by the record." *Scott v. Harris*, 550 U.S. 372, 381 n.8, 127 S. Ct. 1769, 1776 n.8 (2007) (emphasis omitted).

SUMMARY OF ARGUMENT

This Court should grant the State of West Virginia's motion for summary judgment. There are no disputes of material fact, the Administrative Fix is plainly unlawful, and the State of West Virginia has standing to bring this lawsuit.

First, the Administrative Fix violates the ACA's clear mandatory duty. The ACA sets up a two-tiered enforcement regime, which allows States the opportunity to enforce the new federal market requirements voluntarily, but unequivocally mandates that HHS "*shall enforce*" the federal requirements if the agency determines that a State has not done so. 42 U.S.C. § 300gg-22(a)(2)(emphasis added). Under well-established Supreme Court and D.C. Circuit precedent, the proper reading of this provision is that HHS must *both*: (1) determine whether the States are enforcing the federal requirements; and (2) upon a finding of non-enforcement, undertake itself to enforce the requirements. The Administrative Fix's declaration that HHS will not enforce these federal requirements until October 2016, even if the States decline to voluntarily do so, clearly violates this compulsory provision.

Second, the Administrative Fix was issued in violation of the notice-and-comment requirements of the Administrative Procedure Act ("APA"). The APA forbids federal agencies, such as HHS, from promulgating substantive rules without subjecting those rules to public notice and opportunity to comment. 5 U.S.C. §§ 701 et seq.. But HHS did not give notice of or allow any public comment on the Administrative Fix before finalizing it, even though the Fix is a substantive rule that is binding on its face and has been consistently treated as binding by HHS since its issuance.

Third, the Administrative Fix violates the non-delegation doctrine because it unlawfully assigns to the States the unilateral authority to decide whether certain federal laws are enforced.

The Supreme Court and the D.C. Circuit have made clear that the Constitution prohibits the delegation of federal executive authority to non-federal actors—whether sovereign States or private entities. In violation of this principle, the Fix changes a regime where States had no impact on the ultimate enforcement of the ACA's new federal market requirements into a system where States have exclusive authority to determine whether and how the federal requirements will apply within their borders.

Fourth, the Administrative Fix violates the anti-commandeering doctrine because it shifts from the Federal Government to the States the political accountability for deciding whether the ACA's federal market requirements will be enforced at all. The Supreme Court's commandeering cases show that the anti-commandeering doctrine is intended to protect against States being made to be politically accountable for federal law and policies. The Fix does precisely that. Under the ACA, the lines of political accountability are clear because the *Federal Government* has decided that the *federal* requirements will be enforced across the nation regardless of what the States chose to do. But the Fix blurs those lines by withdrawing the Federal Government and leaving the *States* with unconditional discretion to decide whether to enforce the *federal* market requirements. Where the Federal Government was once politically responsible, the States now exclusively are. As the President himself put it, the Federal Government can now "say to these folks, you know what, the Affordable Care Act is not going to be the reason why insurers have to cancel your plan."

Finally, the State of West Virginia plainly has suffered injury sufficient for standing. In particular, because the Fix makes the State the exclusive enforcer of the federal market requirements, the State is now exposed to harm that it would not have suffered if HHS abided by its mandatory enforcement duty under the ACA. Like any private entity given that sort of

exclusive responsibility over federal law, West Virginia now must either spend resources to enforce the federal requirements and suffer the opprobrium for canceled plans, or refuse to enforce them and suffer blame among those citizens who think the federal requirements are good policy. In addition, the State suffers special harm as a sovereign entity, because the Fix has made the State politically accountable for federal policy and diminished the electoral consequences for the federal officials behind the law.

ARGUMENT

I. THE ADMINISTRATIVE FIX VIOLATES THE ACA'S MANDATE THAT HHS "SHALL ENFORCE" THE ACA'S MARKET REQUIREMENTS IF STATES DO NOT

A. In Adopting The Administrative Fix, HHS Violated Its Mandatory Duty To Enforce The ACA's Market Requirements

Numerous Supreme Court and D.C. Circuit cases have held that "shall" commands a mandatory duty, which binds an agency to act. *See generally Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (collecting cases). "It is fixed law that words of statutes or regulations must be given their ordinary, contemporary, common meaning." *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009) (quotations omitted). In turn, "[i]t is also fixed usage that 'shall' means something on the order of 'must' or 'will.'" *Id.* (citing Black's Law Dictionary 1407 (8th ed. 2004)). "'Shall,' the Supreme Court has [thus] stated, 'is the language of command,' *Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S. Ct. 818, 820 (1935); absent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive." *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1188–90, 1192 (D.C. Cir. 1985) (quotation and alternation omitted). Or as the D.C. Circuit has put it, whenever "Congress uses the word 'shall,' it intends to communicate a mandatory action." *Friends of Blackwater v. Salazar*, 691 F.3d 428, 441 (D.C. Cir. 2012).

Even when a federal statute provides that an agency "shall" act only in the event the agency makes a certain predicate determination, the D.C. Circuit and the Supreme Court have interpreted the use of "shall" to also require the agency to make the threshold determination whether the predicate has been satisfied. For example, the federal law at issue in *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013), provided that certain chemicals "shall be refused admission" entry into the country by the Food and Drug Administration "[i]f it appears from the examination of such samples" that the items are "adulterated, misbranded, or" legally unapproved. 21 U.S.C. § 381(a). The agency argued that it had "discretion" as a threshold matter whether to examine the samples at all. *Cook*, 733 F.3d at 8. The D.C. Circuit rejected the argument, holding that Congress's "clear implication" was that the agency "must" examine the samples and "determine whether they appear to violate the" law. *Id.* Similarly, the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438 (2007), confronted a provision mandating that EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). The Supreme Court held that EPA could not avoid the mandatory duty to regulate by simply refusing to reach a threshold "judgment" regarding whether a pollutant "endanger[s] public health or welfare." *Massachusetts*, 549 U.S. at 532–34, 127 S. Ct. at 1462–63 ("the word 'judgment' is not a roving license to ignore the statutory text").

Under this settled case law, HHS's duty under the ACA to enforce the eight federal market requirements is mandatory and nondiscretionary. The ACA provides that States "may" enforce the federal market requirements, but that HHS "shall" do so if the States choose not to enforce. 42 U.S.C. § 300gg-22(a)(1). Specifically, "[i]n the case of a determination by [HHS]

that a State has failed to substantially enforce" the eight federal requirements, "the Secretary [of HHS] *shall enforce* [the provisions of this part] insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage." 42 U.S.C. § 300gg-22(a)(2) (emphasis added); *see also* 45 C.F.R. § 150.203 ("*requiring* CMS enforcement" and referring to the Centers for Medicare and Medicaid Services (CMS), as part of HHS) (emphasis added)). Applying established precedent, the proper reading of this provision is that HHS must *both*: (1) determine whether the States are enforcing the federal requirements; and (2) undertake itself to enforce the requirements upon a finding of non-enforcement. As with the federal statutes in *Cook* and *Massachusetts v. EPA*, HHS's mandatory duty under the ACA includes not only the obligation to act under a certain predicate condition, but also the responsibility to make the threshold determination regarding whether the predicate is satisfied.

The Administrative Fix plainly violates HHS's mandatory enforcement requirement. Under the Fix, HHS has categorically refused to make any determination regarding state enforcement and has actually encouraged the States not to enforce the ACA's federal market requirements for many individual health insurance plans. Administrative Fix Letter, Exh. I at 3. Furthermore, HHS has declared as part of the Fix that it simply will not enforce these federal market requirements on these plans for several years, despite its clear duty to do so any time that the States do not. Administrative Fix Letter, Exh. I at 1; Extension Rule, Exh. N at 1. These declarations have been borne out in practice. Where States have refused to enforce the ACA's federal market requirements and non-compliant plans have been renewed, HHS has consistently failed to bring any enforcement actions.

For this reason alone, this Court must hold the Administrative Fix to be unlawful. Under the APA, a "reviewing court shall . . . hold unlawful and set aside agency action" that is "not in

accordance with law." 5 U.S.C. § 706(2)(A). That is the case here. By abdicating the agency's statutorily mandated duty and committing the agency to act contrary to the plain statutory text, the Administrative Fix is "not in accordance with law." 5 U.S.C. § 706(2)(A); *see also FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 304, 123 S. Ct. 832, 840 (2003) (concluding that the FCC's revocation of licenses in contravention of Section 525 of the Communications Act was "not in accordance with law").

B. The Administrative Fix Is Not A Lawful Exercise Of HHS's "Enforcement Discretion"

When HHS finalized the Administrative Fix, it defended the legality of this action under *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649 (1985), claiming through an agency spokesman "that agencies charged with administering statutes have inherent authority to exercise discretion." Greg Sargent, *White House Defends Legality of Obamacare Fix*, Washington Post, Nov. 14, 2013, at *1 (Exh. P). In *Heckler*, the Supreme Court explained that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831, 105 S. Ct. at 1655. HHS asserted that this discretion may be exercised "when implementing new or different regulatory regimes, and to ensure that transitional periods do not result in undue hardship." Exh. P at *2.

But *Heckler* is inapplicable here. Controlling case law provides that *Heckler* enforcement discretion does not apply where: (1) Congress has specified that the agency's duty to enforce is mandatory by using a term such as "shall"; and (2) even as to a non-mandatory duty, the agency has gone beyond a case-by-case decision to forego enforcement and has instead adopted a broad non-enforcement regime. Both of these exceptions independently preclude any reliance on *Heckler* to salvage the legality of the Administrative Fix.

First, *Heckler* does not permit an agency to exercise enforcement discretion where the statute at issue specifically *requires* enforcement or "circumscrib[es] an agency's power to discriminate among issues or cases it will pursue." 470 U.S. at 833, 105 S. Ct. at 1656. As the Supreme Court explained in *Heckler* itself, Congress certainly can choose to "withdr[a]w discretion from [an] agency and provide[] guidelines for exercise of its enforcement power." *Id.* at 834, 105 S. Ct. at 1657. That was the case in the D.C. Circuit's recent decision in *Cook*. As discussed above, the federal law at issue there provided that certain chemicals "shall be refused admission" entry into the country if certain preconditions applied. 21 U.S.C. § 381(a). The D.C. Circuit specifically rejected FDA's assertion that it had enforcement discretion under *Heckler* to choose whether to refuse or permit admission. *Heckler* had no application, the D.C. Circuit explained, because of the "specific 'legislative direction in the statutory scheme.'" *Cook*, 733 F.3d at 7 (quoting *Heckler*, 470 U.S. at 833, 105 S. Ct. at 1656). The statute there "set[] forth precisely when the agency must determine whether a drug offered for import appears to violate the FDCA, and what the agency must do with such a drug." *Id.*; *see also Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 773–74 (D.C. Cir. 1992) (finding *Heckler* inapplicable because "the statute reflects an intent to circumscribe agency enforcement discretion").

In the present case, Congress explicitly prohibited HHS from exercising enforcement discretion by "specific legislative direction in the statutory scheme." *Cook*, 733 F.3d at 7 (quotations omitted). As already explained, the ACA provides that HHS "shall enforce" the federal market requirements if a State does not. *See supra*, at 4–5. This is the same mandatory language—"shall"—that the D.C. Circuit held in *Cook* to have stripped FDA of enforcement discretion. Indeed, the D.C. Circuit has observed in numerous other cases that when Congress "intend[s] to cabin" an agency's "enforcement discretion, it . . . use[s] obligatory terms such as

'must,' 'shall,' and 'will.'" *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001); *see also Cody v. Cox*, 509 F.3d 606, 610 (D.C. Cir. 2007) (holding that where a statute mandates that an agency "*shall*" act, "Congress has not committed decisions to agency discretion" under *Heckler* (emphasis added)); *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011) (Under *Heckler*, "if the statute in question does *not* 'give any indication that violators *must* be pursued in every case, or that one particular enforcement strategy *must* be chosen over another' and if it provides no meaningful guidelines defining the limits of the agency's discretion, then enforcement is committed to the agency's discretion." (citation omitted)).

Second, even if Congress had vested HHS with some measure of enforcement discretion—which it did not—the Administrative Fix is a blanket refusal to enforce that exceeds the case-specific discretion contemplated in *Heckler*. *Heckler* held that "an agency's decision not to prosecute or enforce" is "generally committed to an agency's absolute discretion" because "[a]n agency generally cannot act against *each* technical violation of the statute it is charged with enforcing." 470 U.S. at 831, 105 S. Ct. at 1655–56 (emphasis added). The Supreme Court further explained that enforcement discretion is important because it permits an agency to weigh many factors on a *case-by-case* basis—such as "whether a violation has occurred," "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id*. at 831, 105 S. Ct. at 1656. In contrast, the Court suggested that an agency's "conscious[] and express[] adopt[ion] [of] a general policy" of non-enforcement would "amount

to an abdication of its statutory responsibilities." *Id*. at 833 n.4, 105 S. Ct. at 1656 n.4 (quotations omitted).[2]

The D.C. Circuit has repeatedly emphasized this case-by-case limitation on *Heckler* discretion. Unlike the exercise of "single-shot non-enforcement decision," the D.C. Circuit has explained, "an agency's adoption of a general enforcement policy" is not a proper application of *Heckler* enforcement discretion. *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (quotations and emphasis omitted). Echoing the Supreme Court, the D.C. Circuit has explained that "an agency's pronouncement of a broad policy against enforcement poses special risks that it 'has consciously and expressly adopted a general policy that . . . amount[s] to an abdication of its statutory responsibilities.'" *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (quoting *Heckler*, 470 U.S. at 833 n.4, 105 S. Ct. at 1656 n.4); *see also MCI Telecomms.*, 765 F.2d at 1190 n.4 (acknowledging that *Heckler* did not involve a "situation where it could justifiably be found that the agency has consciously and expressly adopted a general policy of non-enforcement" (quotations omitted)).

The Fix is not a case-specific decision to decline enforcement, but rather is a wholesale abdication of enforcement for a broad category of individual health insurance plans. In issuing the Fix, HHS did not weigh traditional enforcement concerns such as allocation of scarce

[2] *Heckler* is thus fully consistent with the historical understanding of the Take Care Clause. As the Supreme Court has explained, the "conten[tion] that the obligation imposed on the president to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and is entirely inadmissible." *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 525 (1838). To understand the Take Care Clause to allow "prospective licensing of prohibited conduct [or] policy-based nonenforcement of federal laws for entire categories of offenders" would "collide with another deeply rooted constitutional tradition: the principle that American Presidents, unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations." Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 671 (2014) (collecting historical cases); *see also* Philip Hamburger, *Is Administrative Law Unlawful?* 65-82, 125-28 (2014).

resources and then make an assessment in one case that its resources were better allocated elsewhere. Nor is the Fix even a general policy to evaluate federal enforcement on a case-by-case basis under the factors set forth in *Heckler*. Instead, the Fix commits to a blanket suspension of all federal enforcement of the eight federal market requirements against a defined group of plans—for the sole purpose of absolving the federal government of responsibility for what federal law clearly requires. Presidential Press Conference, Exh. G at *4 ("what we want to do is to be able to say to these folks, you know what, the Affordable Care Act is not going to be the reason why insurers have to cancel your plan")). This outright abandonment of federal enforcement cannot be justified under *Heckler*, even if the ACA did not unequivocally withdraw all enforcement discretion from HHS, as explained above.

II. THE ADMINISTRATIVE FIX VIOLATES THE APA BECAUSE IT WAS ISSUED WITHOUT PUBLIC NOTICE AND COMMENT

Before finalizing certain rules, an agency is required by the APA to provide a "[g]eneral notice of proposed rule-making" and also give "interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)–(c). This requirement is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). Notice and the opportunity for comment serve the "obvious[ly] importan[t] policy goals of maximum participation and full information." *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

The APA provides that the notice-and-comment requirement applies to all "substantive rules" but not to mere policy statements. *Chrysler Corp. v. Brown*, 441 U.S. 281, 301, 99 S. Ct.

1705, 1717 (1979); *see also* 5 U.S.C. § 553(b). A "substantive rule" "grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interests," or "effect[s] a change in existing law or policy." *Am. Hosp. Ass'n*, 834 F.2d at 1045 (quotations omitted). In contrast, a policy statement is an agency document that "does not have a present-day binding effect, that is, it does not impose any rights and obligations, and . . . genuinely leaves the agency and its decisionmakers free to exercise discretion." *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988) (quotation omitted).

Here, the Administrative Fix is a substantive rule subject to the requirements of notice and comment and not a mere policy statement. An agency document constitutes a substantive rule if "either" one of two conditions is satisfied: the document "appears on its face to be binding"; or it has been "applied by the agency in a way that indicates it is binding." *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002); *see also Chrysler*, 441 U.S. at 301–02, 99 S. Ct. at 1717–18 (noting that substantive rules are "binding" or "have the force of law" (quotations omitted)); *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (1999) (considering "whether the action has binding effects on private parties or on the agency"). Both are true here, and HHS therefore violated the APA by finalizing the Fix without public notice and comment.

First, the Administrative Fix is binding on its face. As the D.C. Circuit has explained, an agency document is a "substantive rule" if "the language of the [agency] document is such that parties can rely on it as a norm or safe harbor by which to shape their actions." *Gen. Elec.*, 290 F.3d at 383 (quotations omitted). For example, in *General Electric*, EPA promulgated a "[g]uidance [d]ocument," explaining that applicants that wished to use an "alternative method" to dispose of certain chemicals had to adopt one of two specific approaches to calculating the risk involved. *Id.* at 379. The D.C. Circuit held that the document was a binding rule on its face

because the document used mandatory language like "must," confined applicants to the two approaches in the document, and bound the agency to accept applications that used a particular risk factor. *Id.* at 384–85. In short, "the Guidance Document impose[d] binding obligations upon applicants to submit applications that conform to the Document and upon the Agency not to question use of the [specified] toxicity factor." *Id.* at 385; *see also Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding agency action to constitute a binding rule where "[i]t commands, it requires, it orders, [and] it dictates").

The Administrative Fix is similar to the agency documents considered in these cases. The entire purpose and design of the Administrative Fix is to permit insurance companies to "rely on it as a norm or safe harbor by which to shape their actions." *Gen. Elec.*, 290 F.3d at 383 (quotations omitted). The letter in which HHS memorialized the Fix provides, in unambiguous terms, that a health insurance plan "*will not* be considered to be out of compliance with the market reforms specified below" so long as the plan was "in effect on October 1, 2013" and the insurer sends a required notification. Administrative Fix Letter, Exh. I at 1 (emphasis added). The same is true of other agency documents relating to and implementing the Fix.[3] The repeated and consistent use of mandatory and conclusive language—*e.g.*, "will not be considered," "are not considered"—is the hallmark of a substantive rule, conveying unequivocally to insurance

[3] *E.g.*, Insurer Disclosure Rule, Exh. M at 1 (noting that plans "*will not* be considered to be out of compliance" (emphasis added)); Extension Rule, Exh. N at 1, 3 (same); Insurer Disclosure Rule, Exh. M at 1 (noting that "health insurance issuers may choose to continue coverage that would otherwise be terminated or cancelled, and affected individuals . . . may choose to re-enroll"); Extension Rule, Exh. N at 1 (same); *id.* at 2 (noting that certain large businesses "will have the option of renewing their current policies . . . without their policies being considered to be out of compliance" and that insurers "may renew such policies"); Insurer Disclosure Rule, Exh. M at 2 (promulgating a specific disclosure statement that "*will be* considered to satisfy the [Fix's] requirement to notify policyholders of the discontinuation of their policies" (emphasis added); Extension Rule, Exh. N at 2 (observing that "policies subject to the transitional relief *are not considered* to be out of compliance" (emphasis added)).

companies that they have the right to renew non-compliant plans within the terms of the Fix without fear of federal enforcement. *Gen. Elec.*, 290 F.3d at 384. On its face, the Fix leaves "the agency and its decisionmakers" without any "free[dom] to exercise discretion" in enforcing the federal market requirements against individual plans that fall within the Fix's terms. *McLouth*, 838 F.2d at 1320 (quotation omitted).

Second, the Fix is also clearly a substantive rule because HHS has consistently acted as though the Fix is binding. The D.C. Circuit has held on numerous occasions that a document applied by an agency as binding in the vast majority of cases is a substantive rule, which can only be issued after notice-and-comment rulemaking. For example, in *McLouth Steel Products Corporation v. Thomas*, the D.C. Circuit held that EPA's "later conduct applying [a model] confirm[ed] [the model's] binding character." 838 F.2d at 1321. Noting that EPA had unquestioningly used the model to resolve 96 out of 100 chemical delisting applications, the court determined the model to be a substantive rule. *Id.* at 1320–22. Similarly, the D.C. Circuit held in *United States Telephone Association v. FCC* that a schedule of fines that the agency had labeled a "policy statement" was in fact a substantive rule. 28 F.3d 1232, 1234 (D.C. Cir. 1994). In contrast to other "difficult[]" cases, the D.C. Circuit found it easy to determine "whether the agency intend[ed] to be bound" because the agency had applied the schedule in over 300 enforcement cases and arguably departed from the schedule in only 8. *Id.*

The consistency of enforcement that the agencies demonstrated in *McLouth* and *United States Telephone Association* pales in comparison to HHS's steadfast application of the Administrative Fix. Since HHS finalized the Fix, health insurance companies have renewed *millions* of non-compliant individual insurance plans and—so far as West Virginia has been able to determine—the agency has not brought a single enforcement action against an insurance

company for renewing an insurance plan that falls within the terms of the Administrative Fix. *E.g.*, Dan Mangan, *Feds give 2-year grace period for non-Obamacare plans*, CNBC.com (Mar. 5, 2014) (Exh. Q). There could be no clearer and more consistent example of a policy being "applied by the agency in a way that indicates it is binding." *Gen. Elec.*, 290 F.3d at 383.

Were that not enough, HHS has also treated the Fix as binding in subsequent statements and releases. For instance, HHS's website explains to consumers that "[s]ome states have adopted the transitional policy, *enabling* health insurance issuers to renew their existing [non-compliant] plans and policies." CCIIO, Options Available for Consumers for Cancelled Policies at 1 (Dec. 19, 2013) (emphasis added) (Exh. R). This conclusive language conveys to consumers that HHS has committed not to prohibit the renewal of non-compliant plans. Similarly, HHS has issued guidance to insurers for how to submit non-compliant plans for federal rate review, again reflecting the agency's intent to be bound by the Fix. *See* Agency Information Collection Activities: Submission for OMB Review; Comment Request, 79 Fed. Reg. 18,554 (Apr. 2, 2014).

And finally, HHS has adopted at least two other binding rule changes in anticipation of the financial impacts of the Fix on insurers. Specifically, HHS finalized in March 2014 a rule altering the reinsurance and risk corridors programs to mitigate the Fix's impact on insurers, explaining that the new rule was intended to "mitigate any unexpected losses for issuers of plans subject to risk corridors attributable to the effects of" the Fix. HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744 (Mar. 11, 2014) (to be codified at 45 C.F.R. pt. 144, *et al.*). Two months later, HHS finalized a second rule amending the medical loss ratio program and further altering the risk corridors program, explaining that the modifications were made "to account for the special circumstances of the issuers affected by" the Administrative

Fix. *See* Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,244 (May 27, 2014) (to be codified at 45 C.F.R. pt. 144, *et al*.). These new rules together provide millions of dollars to insurers that, before the Fix, had expected new premiums from millions of new customers. *See* Nicholas Bagley, *How and why the risk corridor program will cost more*, The Incidental Economist (Dec. 2, 2013) (Exh. S). The rules would not have been necessary if HHS did not intend to be bound by the Fix and permit insurers to rely on the Fix "as a norm or safe harbor by which to shape their actions." *Gen. Elec.*, 290 F.3d at 383 (quotations omitted).

III. THE ADMINISTRATIVE FIX VIOLATES THE NON-DELEGATION DOCTRINE BY UNLAWFULLY ASSIGNING TO THE STATES UNILATERAL RESPONSIBILITY FOR ENFORCING FEDERAL LAW

The Constitution vests "[t]he executive Power . . . in a President" who must "take Care that the Laws be faithfully executed" either personally or through subordinate officials that he controls. U.S. Const. art. II, § 1, cl. 1; *id*., § 3. "In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, ___, 130 S. Ct. 3138, 3146 (2010) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). But every such official must remain "accountable" to the President. *Id.*; *see also id.* at 3152 ("Article II confers on the President the general administrative control of those executing the laws." (quotations omitted)). Because "[i]t is *his* responsibility to take care that the laws be faithfully executed," *id.* (emphasis in original), the President "must have some 'power of removing those for whom he can not continue to be responsible,'" *id.* (quoting *Myers v. United States*, 272 U.S. 52, 117, 47 S. Ct. 21, 25 (1926)). Although the President may not always have direct removal

power, there can be at most "one level of protected tenure" between "the President [and] an officer exercising executive power." *Id.* at 3153.

In accordance with these constitutional provisions, the Supreme Court has held that neither Congress nor the President may convey to non-federal entities the responsibility for "administer[ing] the laws enacted by Congress." *Printz v. United States*, 521 U.S. 898, 922, 117 S. Ct. 2365, 2378 (1997). Non-federal entities are not subject to presidential removal or any other sort of "meaningful presidential control." *Id.* If delegation to such entities was permitted, "the power of the President would be subject to reduction" and the Executive's "unity would be shattered." *Id.* at 923, 117 S. Ct. at 2378. This prohibition against delegating executive authority to non-federal parties is "the lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch." *Ass'n of American Railraods. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2865 (U.S. June 23, 2014) (No. 13-1080). While the better-known doctrine prohibits the delegation of legislative authority to the Executive only in the absence of "an intelligible principle" to guide the exercise of the delegated authority, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 352 (1928), "[e]ven an intelligible principle cannot rescue a statute empowering [a non-federal entity] to wield regulatory authority," *American Railroads*, 721 F.3d at 671.

The D.C. Circuit's recent decision in *American Railroads* is particularly instructive. Congress had empowered a private party (Amtrak) and a federal agency (the Federal Railroad Administration or FRA) to "jointly develop" federal regulations, thereby giving Amtrak "an effective veto over regulations developed by the FRA." *Id.* at 668, 671. The D.C. Circuit held that this joint decision-making authority was an impermissible delegation of federal authority to

the non-federal party. *Id.* at 673. It "vitiates," the court explained, "the principle that private parties must be limited to an advisory or subordinate role in the regulatory process." *Id.* "Congress may formalize the role of private parties in proposing regulations," but only "so long as that role is merely 'as an aid' to a government agency that retains the discretion to 'approve, disapprove, or modify' them." *Id.* at 671 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 60 S. Ct. 907, 910 (1940)) (alterations omitted).

Similarly, the D.C. Circuit has long held that an agency may not subdelegate its statutory authority to "an outside party," absent clear direction from Congress that ensures accountability. *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (emphasis omitted). The court recognized "an important distinction between subdelegation to a subordinate and subdelegation to an outside party." *Id.* (collecting cases). In the former circumstance, "responsibility—and thus accountability—clearly remain with the federal agency." *Id.* "But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making." *Id.*; *see also Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 n.41 (D.C. Cir. 1984) (noting the "harm done" by "excessive delegation" to "principles of political accountability").

As the D.C. Circuit made clear in *U.S. Telecom*, delegation to a non-federal entity is impermissible whether the entity is "private or sovereign." 359 F.3d at 566. The purpose of the non-delegation doctrine is to protect the unity of the Executive—as required by the Constitution's charge that the President *himself* "take Care that the Laws be faithfully executed." *See* The Federalist No. 70 at 406–07 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[P]lurality" in "the Executive" "tends to deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power."). This unity is endangered just as

readily when the delegation is to a State as to a private actor. *See, e.g.*, *Printz*, 521 U.S. at 922, 117 S. Ct. at 2378. The States are no more a part of the federal government than private actors are. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399 (1991) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

Under these cases, the Administrative Fix is plainly an improper delegation of executive authority from the Federal Government to the States. Before the Fix, the States were part of what resembled a "cooperative federalism" regime. The Federal Government had determined in the ACA to enforce the eight federal market requirements, but gave the States the opportunity to do so themselves in the first instance. The States' decision had no impact on whether the ACA's new federal market requirements ultimately would be enforced. Through the Fix, however, HHS has unilaterally removed the federal government from the enforcement of the federal market requirements against a large category of health insurance plans. In so doing, the Fix has left the States—which are not subject to federal removal or "meaningful presidential control"—with the exclusive authority to determine whether and how the federal requirements will apply within their borders. This delegation is more total even than what the D.C. Circuit found unlawful in *American Railroads*, where at least Amtrak and the FRA worked cooperatively to create federal standards. Under the Fix, HHS has completely exited the arena, leaving the fate of federal law wholly to the discretion of a non-federal actor.

In fact, the delegation to the States under the Administrative Fix is so complete that it would fail even the "intelligible principle" test, if that test were applicable to the delegation of executive authority to non-federal actors or if the Fix were deemed to have delegated legislative power to the States. *American Railroads*, 721 F.3d at 670 (quotations omitted). The Fix

suspends federal enforcement and leaves entirely to each individual State's discretion the decision whether, and to what extent, the new federal market requirements will apply. Beyond a general recommendation that the States should also refuse to enforce federal law, Administrative Fix Letter, Exh. I at 3, there is no guideline or principle "'to which the person or body authorized to act is directed to conform,'" *Loving v. United States*, 517 U.S. 748, 771, 116 S. Ct. 1737, 1750 (1996) (quoting *J.W. Hampton*, 276 U.S. at 409, 48 S. Ct. at 352) (alteration omitted). This total lack of guidance falls short of even the permissive "intelligible principle" test that is used to evaluate the delegation of federal legislative authority. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473, 121 S. Ct. 903, 912 (2001) (recognizing that a "standardless delegation of power" would be unconstitutional).

IV. THE ADMINISTRATIVE FIX VIOLATES THE ANTI-COMMANDEERING DOCTRINE BY MAKING THE STATES POLITICALLY ACCOUNTABLE FOR FEDERAL LAW

In *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992), and *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365 (1997), the Supreme Court held that the Federal Government cannot, consistent with the Tenth Amendment, commandeer the States or their officers. As the Court explained, the "States are not mere political subdivisions of the United States." *New York*, 505 U.S. at 188–89, 112 S. Ct. at 2434. "State governments are neither regional offices nor administrative agencies of the Federal Government," and "[t]he positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart." *Id.* The Federal Government therefore may not "us[e] the States as the instruments of federal governance." *Printz*, 521 U.S. at 919, 117 S. Ct. at 2377.

Those cases show that concerns about political accountability are at the core of the anti-commandeering doctrine. In both *New York* and *Printz*, the Court struck down federal laws that sought to "compel the States to enact or administer a federal regulatory program." *New York*,

505 U.S. at 188, 112 S. Ct. at 2435; *accord Printz*, 521 U.S. at 933, 117 S. Ct. at 2383. The problem with the laws, the Court explained, is that the Framers deliberately rejected a system of government in which Congress would "employ state governments as regulatory agencies." *New York*, 505 U.S. at 163, 112 S. Ct. at 2423. The Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920, 117 S. Ct. at 2377. And the Federal Government "must carry its agency to the persons of the citizens . . . . [and] address itself immediately to the hopes and fears of individuals." *New York*, 505 U.S. at 163, 112 S. Ct. at 2422 (quotations omitted). But "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished." *Id.* at 168, 112 S. Ct. at 2424.

The anti-commandeering doctrine protects against States being "put in the position of taking the blame for [a federal law's] burdensomeness and for its defects," *even where* "*the States are not forced to absorb the costs of implementing a federal program*." *Printz*, 521 U.S. at 930, 117 S. Ct. at 2382 (emphasis added). The Supreme Court's fundamental concern was that "state officials . . . will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169, 112 S. Ct. at 2424. The Federal Government must "make [its] decision" in "full view of the public," the Court explained, so that "it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *Id.* at 168, 112 S. Ct. at 2424. The Court even held that States cannot "consent" to accept from the Federal Government "shift[ed] responsibility" for federal policy. *Id.* at 182–83, 112 S. Ct. at 2432 (quotations omitted).

Since *New York* and *Printz*, a majority of the Supreme Court has reaffirmed that misplaced political accountability is the driving concern behind the prohibition on commandeering. "Permitting the Federal Government to force the States to implement a federal program . . . threaten[s] the political accountability key to our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J., joined by Breyer and Kagan, JJ.); *see also id.* at 2660 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) ("When Congress compels the States to do its bidding, it blurs the lines of political accountability."). A critical question is whether the States or state officials can "fairly be held politically accountable for" their actions, or if the Federal Government is attempting to "achieve its objectives without accountability." *Id.* at 2603 (Roberts, C.J., joined by Breyer and Kagan, JJ.).

Here, the Administrative Fix violates the anti-commandeering doctrine because it shifts from the Federal Government to the States the political accountability for deciding whether the ACA's federal market requirements will be enforced at all. As already noted, the States had no power before the Fix to affect the ultimate enforcement of the new federal requirements, and thus bore no political accountability for that decision. *See supra*, at 4–5. Although the States could choose to be a part of the enforcement regime, the ACA made clear that the federal requirements would be enforced across the nation regardless of what the States chose to do. In other words, the *Federal Government* "ma[d]e the decision" to enforce the *federal* market requirements, and "it [would] be *federal* officials that suffer the consequences if the decision turns out to be detrimental or unpopular." *New York*, 505 U.S. at 168, 112 S. Ct. at 2424 (emphasis added). Before the Fix, the political accountability thus rested exclusively where it belongs: on the shoulders of the Federal Government.

By giving the States the unconditional discretion to decide whether to enforce the federal market requirements, the Administrative Fix unlawfully made the States assume the political accountability for that decision. HHS has now removed itself entirely from the enforcement question, and left each State to determine completely and freely within its discretion whether the ACA's federal market requirements will be enforced in its jurisdiction and, consequently, whether non-compliant plans can be renewed. This re-writing of the ACA imbues the States' decisions with significantly greater practical and legal consequence, and thereby shifts political accountability to the States in violation of the Tenth Amendment. On the one hand, if a State chooses to enforce the ACA's federal requirements, it is the State "and not some federal official who stands between" a citizen and his canceled plan. *Printz*, 521 U.S. at 930, 117 S. Ct. at 2382; *see also* Presidential Press Conference, Exh. G at *4 ("what we want to do is to be able to say to these folks, you know what, the Affordable Care Act is not going to be the reason why insurers have to cancel your plan"). On the other hand, if a State chooses not to enforce the federal requirements, those who support implementing the federal policy changes behind the requirements may blame the States because they genuinely believe that all people have a right to health insurance plans that meet the ACA's terms and conditions. All the while, federal accountability is "diminished," and the "federal officials who devised the [ACA's market requirements] may remain insulated from the electoral ramifications of their decision" in enacting the ACA. *New York*, 505 U.S. at 169, 112 S. Ct. at 2424.

Importantly, the Supreme Court has recognized that federal action—like the Administrative Fix—can shift political accountability no matter how high-profile the federal action. For example, the Court found in *Printz* that Congress had improperly shifted political accountability to state chief law enforcement officers ("CLEOs") by requiring them to conduct

background checks during handgun sales. The Court reasoned: "[I]t will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." 521 U.S. at 930. Thus, "it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected." *Id*. This Court did not find that the notoriety of the challenged federal law—the Brady Act—diminished the likelihood that the public would blame local rather than federal officials for the policy.

Although HHS did not require the States to enforce federal law—as the Federal Government had done in *New York* and *Printz*—its novel effort to grant the States unconditional and unguided discretion over federal law is no less unconstitutional. The Supreme Court has observed that "lack of historical precedent" for a particular practice can be an indication that the practice is unlawful. *Free Enter. Fund*, 561 U.S. at ___, 130 S. Ct. at 3159; *see also Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1641, 179 L.Ed.2d 675 (2011) ("Lack of historical precedent can indicate a constitutional infirmity."); *American Railroads*, 721 F.3d at 673 ("[N]ovelty may, in certain circumstances, signal unconstitutionality."). This principle has particular relevance in the context of the anti-commandeering doctrine, as federal commandeering of state governments is generally a "novel phenomenon." *Printz*, 521 U.S. at 925, 117 S. Ct. at 2379. Indeed, the Supreme Court recognized in *New York* and *Printz* that other types of accountability-shifting federal action could constitute unlawful commandeering. *See New York*, 505 U.S. at 188, 112 S. Ct. at 2435 (noting that the unconstitutional federal law did not test the "outer limits" of state sovereignty). The Administrative Fix is such an action. The fact that courts have not previously encountered a similar effort to make the States exclusively in charge of federal law is merely confirmation of its constitutional infirmity.

V. THE STATE OF WEST VIRGINIA HAS STANDING TO CHALLENGE THE ADMINISTRATIVE FIX

It is well established that a plaintiff, in order to have standing, must have suffered "an injury in fact" that was caused by the challenged conduct and will likely be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992) (citations omitted). Because "legal wrongdoing" can have many different "result[s]," invasions of "legally protected interests" can vary widely in nature. *Transp. Workers Union of Am., AFL-CIO v. Transp. Sec. Admin.*, 492 F.3d 471, 473–74 (D.C. Cir. 2007). "[E]conomic injury is not the only kind of injury that can support a plaintiff's standing." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262–63, 97 S. Ct. 555, 562 (1977). Injuries to sovereign interests and reputations, among other harms, are also sufficient. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601, 102 S. Ct. 3260, 3265–66 (1982) (sovereign interests); *Foretich v. United States*, 351 F.3d 1198, 1211 (D.C. Cir. 2003) (reputation).

At least two factors significantly lighten West Virginia's burden in demonstrating that it has standing in this case. *First*, when a plaintiff is the "object of the action (or forgone action) at issue," there is generally "little question that the action or inaction has caused him injury." *Lujan*, 504 U.S. at 561–62, 112 S. Ct. at 2137. That West Virginia and the other States are the "object" of the Administrative Fix is plainly apparent; HHS issued the letter formalizing the Fix specifically to all *state insurance commissioners*. *Second*, States such as West Virginia "are not normal litigants for the purposes of invoking federal jurisdiction" and are afforded "special solicitude" for purposes of standing. *Massachusetts v. EPA*, 549 U.S. 497, 518–20, 127 S. Ct. 1438, 1454–55 (2007); *see also Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1144–45 (9th Cir. 2013) (collecting cases).

Especially in light of these factors, West Virginia easily satisfies the burden of showing that it has standing to maintain this lawsuit. Specifically, the Fix has caused West Virginia at least two types of injuries, each of which is independently sufficient for standing to raise all the statutory and constitutional claims in this case.[4] *First*, the Fix harms the State because it places upon West Virginia the exclusive responsibility to decide whether and to what extent to enforce federal law within its borders. Like *any* party placed in that unique position of having exclusive responsibility for the enforcement of federal law, the State is harmed by having to exercise that decision-making authority and has standing to bring arguments that, if successful, would free itself of the responsibility. *Second*, at a minimum, the Fix injuries the State in its sovereign capacity because it requires West Virginia to assume the political accountability for federal policy choices.

A. West Virginia Has Been Injured Because The Administrative Fix Places Upon The State The Exclusive Responsibility For Deciding Whether, And To What Extent, Federal Law Will Apply Within Its Borders

The Fix harms West Virginia in at least the same way that any party assigned exclusive enforcement responsibility over a federal problem would be harmed by such a delegation. It is given a role it did not seek: to have the *exclusive* responsibility for deciding whether federal law is enforced within its jurisdiction. As described above, in adopting the Fix, HHS abdicated its statutory responsibility to enforce the ACA's federal market requirements, leaving West Virginia with sole authority to determine whether those federal requirements will apply within the State. This assignment of exclusive federal authority is unlawful both under the plain text of the ACA

[4] *See also Texas v. United States*, 497 F.3d 491, 496-97, 499 (5th Cir. 2007) (holding that because "Texas has suffered the injury of being compelled to participate in an invalid administrative process," "standing exists on this basis" for Texas to bring statutory claims as well as claims "that the Procedures violate the constitutional separation of powers and nondelegation doctrines").

and under the non-delegation doctrine, as previously explained, and it also imposes constitutionally cognizable harm on the State.

The Fix exposes West Virginia to harm that it would not have suffered if HHS abided by its mandatory duty under the ACA. Before the Fix, the State had the option of refusing to enforce the ACA's federal market requirements without any consequences. That is because the Federal Government was *required* to enforce the ACA and thus no non-compliant plans would be sold in West Virginia no matter what the State did.

But by giving to West Virginia exclusive and unchecked authority over the federal market requirements within its borders, the Fix forces the State into a position where it must take one of two paths, either of which imposes constitutionally cognizable harm on the State. On the one hand, if the State chooses to enforce the federal requirements within its borders, it will be required to expend resources for such enforcement *and* suffer opprobrium from the individuals who will blame the State for health insurance canceled pursuant to the federal standards. On the other hand, if the State chooses not to enforce the ACA's federal market requirements within its borders, those West Virginians who believe the ACA is a good law will now blame the State for "vetoing" the ACA's federal market requirements.

This sort of no-win injury would be suffered by *any* entity—whether a State or a private party—that is forced to become the exclusive enforcer of *any* federal law. Consider, for example, if Congress passed a statute deputizing the National Cattlemen's Beef Association as the *exclusive* authority over all meat inspections for beef sold in the country, with full discretion to determine whether to enforce the federal food safety standards. If the Association had not sought this exclusive authority, it would unhappily find itself with two choices: either expend resources to enforce federal beef safety standards and suffer opprobrium from an unhappy beef

industry that it is now regulating; or refuse to enforce the law and potentially be held responsible by an angry public after an outbreak of mad cow disease or some other beef-borne pestilence. The Association would certainly have standing to challenge the law that placed it in this position, where it suffers harm no matter what path it chooses. For the same reasons, West Virginia has standing to bring this suit to extricate itself from the responsibility and blame foisted upon it by the Fix

While complete delegation of federal authority to a non-federal party is rare (if not unprecedented), the Supreme Court's decision in *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855 (1936), is instructive. In that case, a statute coerced private coal-producers into joining an industry "code" under which certain of the code members would act as a commission and make binding regulatory decisions for the industry's companies and labor force as a whole. *Id.* at 284, 56 S. Ct. at 861. In one of several consolidated cases, an affected company brought suit to enjoin enforcement of the law. In another, a stockholder of one of the companies believed the law to be unconstitutional and brought suit against the company after the board of directors decided to join the code. The Court agreed with the challengers to the law, who had sought to free their industry from an unwanted delegation of authority, finding the law to be "delegation in its most obnoxious form" and striking down the law as unconstitutional. *Id.* at 311, 56 S. Ct. at 873. Here, too, West Virginia is seeking to free itself from being delegated exclusive enforcement authority, and should be found to have standing to do so.

B. West Virginia Has Been Injured Because The Administrative Fix Shifts Political Accountability From The Federal Government To The State

Even if this Court does not hold that *every* party made to be the exclusive enforcer of federal law has suffered constitutionally cognizable injury, it is clear at minimum that a *State* placed in that position suffers harm to its sovereign interests by being forced to assume political

accountability for federal policy. *See Alfred L. Snapp*, 458 U.S. at 601, 102 S. Ct. at 3265–66 (harm to sovereign interests sufficient for State standing). The Supreme Court has held that States have a protectable sovereign interest in not being held politically accountable by their citizens for the enforcement or nonenforcement of federal law within their borders, even where "the States are not forced to absorb the costs of implementing a federal program." *Printz*, 521 U.S. at 930, 117 S. Ct. at 2382. "State officials" suffer such cognizable sovereign harm when they are forced to "bear the brunt of public disapproval" for a federal program, *New York*, 505 U.S. at 169, 112 S. Ct. at 2424, or are "held politically accountable for" for the federal program, *NFIB*, 132 S. Ct. at 2603 (Roberts, C.J., joined by Breyer and Kagan, JJ.).

As explained above, the Administrative Fix makes West Virginia (and other States) politically accountable for deciding whether to enforce the ACA's federal market requirements. The lines of political accountability were clear before the Fix: It was the *Federal* Government that created the ACA's new federal market requirements, and the *Federal* Government made enforcement mandatory. If West Virginians were dissatisfied with the law or its enforcement, they could vote to remove the responsible federal officials in federal elections. The Fix undermines those lines of accountability, however, by giving West Virginia and the other States dispositive power over the enforcement of the federal market requirements. Within West Virginia, the State is now perceived to be politically responsible for the fate of the federal market requirements. Now, "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulate from the electoral ramifications of their decision." *New York*, 505 U.S. at 169, 112 S. Ct. at 2424. This blurred political accountability diminishes the sovereignty of West Virginia by interfering with the relationship between the State and its citizens, and inhibiting the ability of elections to

properly hold public officials accountable. *See Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 2400 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

Importantly, this shift in political accountability is sufficient to establish West Virginia's standing in this case even if this Court ultimately concludes that the shift is not sufficiently serious to warrant summary judgment in the State's favor on its anti-commandeering claim. After all, "[a] party need not *prove* that the agency action it attacks is unlawful . . . in order to have standing to level that attack." *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 368 (D.C. Cir. 1998) (emphasis in original). Consistent with this principles, in the commandeering cases that the Supreme Court has considered, "[n]either the majority opinion nor the opinions of" any "Justices who wrote separately questioned [the State or state officials'] standing to sue." *Lomont v. O'Neill*, 285 F.3d 9, 13 (D. C. Cir. 2002); *see also Frank v. United States*, 129 F.3d 273, 275 (2d Cir. 1997) ("we are constrained by *Printz* to affirm the judgment of the district court conferring standing upon Sheriff Frank"). The D.C. Circuit has followed that approach in its anti-commandeering cases, *first* finding that the plaintiffs have standing to bring their claims and only thereafter holding that the plaintiffs did not prevail on the merits of those claims. *Fraternal Order of Police v. United States*, 173 F.3d 898, 904–07 (D.C. Cir. 1999) (finding standing to bring anti-commandeering claims, but upholding the law because it "does not force state officials to do anything affirmative"); *accord Lomont*, 285 F.3d at 13–14 (finding Article III standing to bring Tenth Amendment claim, but holding against plaintiffs on the merits); *see also Gillespie v. City of Indianapolis*, 185 F.3d 693, 703–04 (7th Cir. 1999) (same).

CONCLUSION

This Court should grant the State of West Virginia summary judgment.

Respectfully submitted,

Patrick Morrisey (DC Bar 459399)
Attorney General of West Virginia

s/ Elbert Lin
Elbert Lin (DC Bar 979723)
Solicitor General
Misha Tseytlin (DC Bar 991031)
Deputy Attorney General
Julie Marie Blake (DC Bar 998723)
Assistant Attorney General

Office of the Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: elbert.lin@wvago.gov

Counsel for Plaintiff the State of West Virginia

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